



## **Case Summary**

George Bailey, Mark McDaniel, James McDaniel, and James Fleener (“Owners”) appeal the trial court’s judgment that a mechanic’s lien held by Concord Construction, Inc., (“Concord”) was valid and enforceable. We reverse.

## **Issue**

The Owners raise three issues, which we consolidate and restate as whether Concord’s mechanic’s lien on the Owners’ property was enforceable against their interest in real property.

## **Facts**

In August 2001, the Owners entered into a contract with Jonas Anderson of Contemporary Contractors, Inc., (“Buyer”) for the sale of approximately five acres of farm land in Martinsville. The contract was contingent on the approval of a zoning change and on the Buyer receiving financing to purchase the property. The Buyer intended to construct an indoor motorcross track on the property. The closing date was repeatedly pushed back, and the final closing date was set for November 26, 2001.

On November 5, 2001, Commercial Builders, Inc., (“Commercial”) contracted with Concord to construct a steel building that would house the motorcross track. This contract called for Concord to begin construction in a short period of time, and Concord began construction.

The Owners and the Buyer did not close on the real estate sale. On December 11, 2001, the Owners obtained a stop work order. At that time, Concord’s work was 85% complete. On January 4, 2002, Concord filed a mechanic’s lien against the property.

Much litigation ensued between the various parties. In September 2002, the partially constructed building was completely destroyed by a tornado.

On July 10, 2006, the trial court conducted a trial on Concord's allegation that it held a valid and enforceable mechanic's lien against the property. On July 25, 2006, the trial court issued an order concluding that Concord's mechanic's lien was valid and enforceable in the amount of \$116,494.00. The trial court ordered that the property be sold to satisfy the judgment. The Owners now appeal.

### **Analysis**

The Owners contend the trial court improperly concluded that Concord held a valid and enforceable mechanic's lien against the property. The trial court here entered findings of fact and conclusions of law. In reviewing claims tried without a jury, the findings and judgment are not to be set aside unless clearly erroneous, and due regard is to be given to the trial court's ability to assess the credibility of the witnesses. Ind. Trial Rule 52(A); Fraley v. Minger, 829 N.E.2d 476, 482 (Ind. 2005). "While findings of fact are reviewed under the clearly erroneous standard, appellate courts do not defer to conclusions of law, which are reviewed de novo." Fraley, 829 N.E.2d at 482. Only when the evidence is without conflict, leading to but one conclusion, and the trial court reaches a contrary conclusion, will we reverse the decision as being contrary to law. Gill v. Pollert, 810 N.E.2d 1050, 1058 (Ind. 2004). We will not weigh evidence, but will consider the evidence in a light most favorable to the judgment. Fobar v. Vonderahe, 771 N.E.2d 57, 59 (Ind. 2002).

Generally, a contractor may attach a mechanic's lien to real estate in order to recover wages and costs. Gill, 810 N.E.2d at 1058 (citing Ind. Code § 32-28-3-1). “Before this lien may attach, however, ‘it is necessary that such materials should be furnished or labor performed by the authority and direction of the owner, and something more than mere inactive consent on the part of such owner is necessary in order that such lien may be acquired against him.’” Id. at 1058-59 (citations omitted). “A lien claimant’s burden to prove active consent to improvements is especially important when they are requested by someone other than the landowner.” R.T.B.H., Inc. v. Simon Property Group, 849 N.E.2d 764, 766 (Ind. Ct. App. 2006), trans. denied. Without the landowner’s active consent, a lien claimant can only maintain a lien to the extent of his or her customer’s interest in the land. Id. A person improving real estate must take notice of the extent of his or her customer’s rights in the land and of the rights of those in possession. Id.

The Owners argue that although they were aware of the construction, they did not actively consent to it. They assert, “they did not direct or otherwise participate in or authorize or act in a way that was instrumental to the work to be done on the property, their involvement not being sufficient to cause imposition of a lien where there is not direct dealings with Concord or any other contractors or subcontractors herein.” Appellants’ Br. p. 7.

Indeed, the Owners testified that they lived near the property and were aware that construction had begun. They testified that they allowed the Buyer to have the zoning changed. James McDaniel testified that he gave the Buyer permission to unload trucks of

steel on the property. James McDaniel also testified that when the Buyer asked if they could start construction prior to closing, they “reluctantly agreed to go ahead and let them start with the promise of this closing that would come up shortly thereafter.” Tr. p. 106. He stated that this conversation took place on a Friday and closing was scheduled for the following Tuesday. Id. at 107. Ryan O’Neal of Concord testified that he had conversations with each landowner “about Jonas Anderson and how he could get in touch with him.” Tr. p. 33. There is no evidence that the Owner’s otherwise participated in the construction of the building.

The issue is whether this limited involvement of the Owners qualifies as active consent to the construction. Relying on Harris v. Mt. Vernon Lumber Co., 131 Ind. App. 593, 173 N.E.2d 672 (1961), the trial court concluded that the Owners actively consented to Concord’s improvement of the property. In that case, the Harrises agreed to sell a building with storerooms downstairs and a residence upstairs to LaChance. LaChance intended to remodel the building and the parties agreed that he could begin the remodeling as soon as the contract was signed. Ike Todd helped LaChance with the construction. Harris showed Todd and LaChance around the building, Todd had material delivered to the site, and LaChance began construction while Harris lived in the upstairs residence. Sometime later, LaChance rescinded the contract with Harris and did not pay the suppliers of the construction materials. In deciding whether Harris had actively consented to the improvements we considered that:

Harris was fully aware of what LaChance had in mind as to remodeling the building when the contract of sale was executed. He testified that it was all right for LaChance to

improve the property if he wanted to, so long as he did not tear it down. They had discussed finishing some bedrooms before the contract was signed. Harris admitted that he gave LaChance permission to cut a hole through a wall in order to place a door therein so that there would be extended space for the tavern. In connection therewith, Harris was asked on the witness stand if he had said that was “all right.” He answered: “Why sure it was all right if he was going to improve it and pay for it.”

Id. at 600-01, 173 N.E.2d at 676. In concluding that Harris actively consented, we found:

that the actions of appellants were more than idly sitting by knowing that work was being done on the building. They both had knowledge that materials were being furnished and going into the remodeling. They made no objection. The actions on the part of Payton Harris were more than negative, and amounted to affirmative acts. The statements on the part of his wife indicated that she had agreed with everything that her husband had said to and done with LaChance. They would indicate she ratified her husband’s actions.

Id. at 602, 173 N.E.2d at 677.

Concord contends, “The facts in the current matter are strikingly similar to the facts in Harris.” Appellee’s Br. p. 6. The facts of this case are similar to Harris in some ways. For example, the Owners allowed the storage of materials and construction to begin prior to closing. On the other hand, this was not agreed upon by the Owners and the Buyer prior to them entering into the contract for the sale of the land. Further, the Owners allowed construction to begin only days before closing was scheduled. Moreover, although aware of the construction, it is largely undisputed that the Owners were not at all involved in details of the construction process. They did not hire any contractors, they were not involved in the design of the building, and they had no

relationship with the Buyer other than as the sellers of the land. Thus, this case did not involve the same level of participation by the property owners as in Harris.

Moreover, we are not entirely convinced that Harris is still good law. Our supreme court has recently acknowledged that when determining whether a property owner actively consented:

The exact nature and content of the owner's active consent in this context will vary from case to case; however, case law makes clear that the focus is not only on the degree of the owner's active participation in the decisions and the actual construction. Instead, the focus is also on how closely the improvements in question resemble a directly bargained-for-benefit.

Gill, 810 N.E.2d at 1059. As we have discussed, the Owners had little, if any, active participation in the decisions and the actual construction other than to allow it to begin shortly before the scheduled closing. There is no evidence that the Owners benefited from the construction of the building. The destruction of it by a tornado notwithstanding, James McDaniel testified that he had no need for a building of that size. He testified, "It was a white elephant to us. It was, you know, in the way and it locked our property up and it was no benefit to us at all." Tr. p. 111. He went on to explain:

It was a complete detriment to us. You know, it was our property. We lost the use of it. This building was, you know, half completed and in the way and we lost the use of the farm ground. Had all the liens coming into us. Had to hire an attorney. It was, it was not an asset. It was a, a problem that we had to sort out.

Id. Mark McDaniel also testified that after the building was destroyed they had to clean it up and that now the ground is covered with stone and concrete and it is not farmable.

See id. at 81. The only directly bargained-for-benefit to the Owners would have come from the sale of the land to the Buyer, and the Owners would have received this benefit regardless of the construction of the building. Thus, the construction of the building contributed little to the benefit bargained for by the Owners.

In this case, there is insufficient evidence of the Owners' active consent to the construction of the indoor motorcross track. Concord's recourse is against Commercial,<sup>1</sup> not the Owners. Concord does not hold a valid and enforceable mechanic's lien against the Owners' real estate.

### **Conclusion**

There is insufficient evidence that the Owners actively consented to the construction of the motor cross track. Thus, Concord does not hold a valid and enforceable mechanic's lien against the Owners' real estate. We reverse.

Reversed.

NAJAM, J., and RILEY, J., concur.

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<sup>1</sup> In August 2005, Concord obtained a judgment in the amount of \$144,866.87 against Commercial.